Annotated
MANUAL FOR
COMPLEX
LITIGATION
THIRD

2003

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Orderly management of the litigation will ordinarily be served by deferring commencement of discovery until after adoption of a plan.

Subjects for consideration at the conference bearing on the discovery plan may include the following:

- detailed examination of the specifics of proposed discovery in light of the provisions of Rule 26(b)(2) calling for[57]
  - –limiting discovery that is cumulative, duplicative, more convenient or less burdensome or expensive to obtain from another source, or seeks information the party has had ample opportunity to obtain; and
  - –balancing the burden and expense of any discovery sought against its benefit, considering the need for the discovery, the importance of the amount or issues at stake, and the parties' resources;

  (These provisions confront the parties with the need to make choices; some documents may remain undiscovered and some discovery forgone. Parties need also to avoid early, unproductive discovery lest later discovery, though needed, be barred as creating an undue aggregate burden under Rule 26(b)(2).)
- directing disclosure of core information where appropriate to avoid the cost and delay of formal discovery (see *supra* section 21.13);
- reminding counsel of their professional obligations in conducting discovery and the implications of the certification under Rule 26(g) that all disclosures and discovery responses are complete and correct when made, and that requests, objections, and responses conform to the requirements of the Federal Rules;
- providing for compliance with the supplementation requirements of Rule 26(e)(1) and (2),[122] by setting periodic dates for reports;
- providing for periodic status reports to monitor the progress of discovery (which can be informal, by letter or telephone); and
- issuing an order, which may be a part of the scheduling order required by Rule 16(b) (see *supra* section 21.212), incorporating the schedule, limitations, and procedures constituting the discovery plan. For a sample order, see *infra* section 41.33.

21.422 Limitations

Limitations to control discovery in complex litigation may take a variety of forms, including time limits, restrictions on scope and quantity, and sequencing. As noted above, the Federal Rules and the court's inherent power provide broad authority. Among other provisions, Rule 16(b) directs the court to limit the time for discovery, and Rule 26(b) directs the court to limit the "frequency or extent of use of the discovery methods" under the rules, including the length of deposi[58]tions. Rule 30(a) imposes a presumptive limit of ten depositions per side, and Rule 33 establishes a presumptive limit of twenty-five interrogatories per party (see infra sections 21.451, 21.462). Rule 26(f)(3) requires the parties to address discovery limits in their proposed discovery plan.

Limits (which may be made merely presumptive) should be set early in the litigation, before discovery has begun. Because information about the litigation will

122. Rule 26(e)(2) does not apply to deposition testimony, but when the deposition of an expert from whom a report was required under Rule 26(a)(2)(B) reveals changes in the expert's opinion, it triggers the duty of supplementation imposed by Rule 26(e)(1). See Fed. R. Civ. P. 26 advisory committee's note; Fed. R. Civ. P. 26(a)(2)(C).

be limited at that time, limits may need to be revised in the light of later developments. But they should be imposed on the basis of the best information available at the time, after full consultation with counsel, and on the understanding that they will remain binding until further order. In determining appropriate limits, the court will need to confront difficult questions of balancing efficiency and economy against the parties' need to develop an adequate record for summary judgment or trial. The difficulty of this task should not deter the judge from undertaking it, but it underlines the importance of clarifying and understanding the issues in the case before imposing limits.[123]

- **Time limits and schedules.** The discovery plan should include a schedule for the completion of specified discovery, affording a basis for judicial monitoring of progress. Setting a discovery cutoff date[124] at the initial conference, however, may not be feasible in complex litigation, though the setting of such a date at the appropriate time should remain an objective. When a discovery cutoff date is set, it should not be set so far in advance of the anticipated trial date that the product of discovery becomes stale and the parties' preparation outdated. Time limits impose a valuable discipline on attorneys, forcing them to be selective and helping to move the case expeditiously, but standing alone may be insufficient to control discovery costs. Unless complemented by other limitations, attorneys may simply conduct multitrack discovery, increasing expense and prejudicing parties with limited resources. To prevent time limits from being frustrated, the court should rule promptly on disputes so that further discovery is not delayed or hampered while a ruling is pending.
- **Limits on quantity.** Time limits may be complemented by limits on the number and length of depositions, on the number of interrogatories, and on the volume of requests for production. Such limitations should be imposed only after the court has heard from the attorneys and is able to make a reasonably informed judgment about the needs of the case. They are best applied sequentially to particular phases of the litigation, rather than as aggregate limitations. When limits are placed on discovery of voluminous transactions or other events, statistical sampling techniques[59] may be used to measure whether the results of the discovery fairly represent what unrestricted discovery would have been expected to produce (for a general discussion of statistical sampling, see infra section 21.493).
- **Phased, sequenced, or targeted discovery.** It will rarely be possible for counsel and the court to determine conclusively early in the litigation what discovery will be necessary; some discovery of potential relevance at the outset may be rendered irrelevant as the litigation proceeds and the need for other discovery may become known only through later developments. For effective discovery control, therefore, the court should direct initial discovery at matters—witnesses, documents, information—that appear pivotal. As the litigation proceeds, this initial discovery may render other discovery unnecessary or provide leads for further necessary discovery. Initial discovery may also be targeted at information that may facilitate settlement negotiations or provide the foundation for a dispositive motion; a discovery plan may call for limited discovery to lay the foundation for early settlement discussions. Targeted discovery may be nonexhaustive, conducted to rapidly produce critical information on one or more specific issues. In permitting this kind of discovery, the court must

123. See Schwarzer and Hirsch, supra note 106.

124. *See In re* Fine Paper Antitrust Litig., 685 F.2d 810 (3d Cir. 1982).

balance the potential savings against the risk of later duplicative discovery should the deposition of a witness or the production of documents have to be resumed. Targeted discovery may in some cases be appropriate in connection with a motion for class certification; matters relevant to such a motion may, however, be so intertwined with the merits that targeting discovery would be inefficient. See *supra* section 21.41 and *infra* section 30.12.

- **Subject matter priorities.** Where the scope of the litigation—as, for example, in the case of antitrust litigation—is in doubt at the outset, discovery may be limited to particular time periods or geographical areas, until the relevance of expanded discovery has been established. See *supra* section 21.41.
- **Sequencing by parties.** Although discovery by all parties ordinarily proceeds concurrently, sometimes one or more parties should be allowed to proceed first. For example, if a party needs discovery to respond to an early summary judgment motion, that party may be given priority. The court may establish periods in which particular parties will be given exclusive or preferential rights to take depositions, and in multiple litigation the court may direct that discovery be conducted in some cases before others. Sometimes "common" discovery is ordered to proceed in a specified sequence, without similarly limiting "individual" discovery in the various cases.[60]
- **Forms of discovery.** The court may prescribe a sequence for particular types of discovery—for example, interrogatories may be used to identify needed discovery and documents, followed by requests for production of documents, depositions, and finally requests for admission.

If the court directs that discovery be conducted in a specified sequence, leave should be granted to vary the order for good cause, as when emergency depositions are needed for witnesses in ill health or about to leave the country.

21.423 Other Practices to Save Time and Expense

Various other practices can help minimize the cost, delay, and burden associated with discovery. They include the following:

- **Stipulations under Fed. R. Civ. P. 29.** The rule gives parties authority to alter procedures, limitations, and time limits on discovery so long as they do not interfere with times set by court order. Thus the parties can facilitate discovery by stipulating with respect to notice and manner of taking depositions and adopting various informal procedures. The court may, however, require that it be kept advised to ensure compliance with the discovery plan and may by order preclude stipulations on particular matters.
- **Informal discovery.** Counsel should be encouraged to exchange information, particularly relevant documents, without resort to formal discovery (see *supra* section 21.13). Early exchanges can make later depositions more efficient. Informal interviews with potential witnesses can help determine whether a deposition is needed, inform later discovery, and provide the basis for requests for admission through which the results of informal discovery are made admissible at trial.
- **Automatic disclosure.** Rule 26(a)(1) and many local rules and standing orders require the parties to identify relevant witnesses and categories of documents early in the litigation, without waiting for discovery requests. By stipulation or court order, the timing and content of this disclosure may be tailored to the needs of the particular case. See *supra* section 21.13.
- **Reducing deposition costs.** Savings may be realized if depositions are taken, when feasible, by telephone, by electronic recording devices, or by having deponents come

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2005, I electronically filed ***Appendix to Debtors' Response to the Joint Statement of the Asbestos Personal Injury Creditors Committee and the Legal Representative for Future Asbestos Claimants Regarding Discovery in Advance of Hearing on Methodology for Asbestos Personal Injury Estimation (Volume 1 of 2)*** with the Clerk of Court using CM/ECF which will send notifications of such filing to the following:

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I hereby certify that on May 26, 2005, I caused a copy of the ***Appendix to Debtors' Response to the Joint Statement of the Asbestos Personal Injury Creditors Committee and the Legal Representative for Future Asbestos Claimants Regarding Discovery in Advance of***

Hearing on Methodology for Asbestos Personal Injury Estimation (Volume 1 of 2) to be served via e-mail upon the attached *Service List*[1].

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[1] As defined in and in accordance with *Order Establishing Case Management and Scheduling Procedures for All Matters in the Above-Captioned Bankruptcy Cases Which the Reference has been Withdrawn from the United States Bankruptcy Court for the District of Delaware to the United States District Court for the District of Delaware* [Docket No. 8 in Case #04-1560; Docket No. 6 in Case #04-1559 – entered March 23, 2005]

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